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Supreme Court, U.S.
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No. 02-1370

IN THE

Supreme Court of the United States

S.P.,

Petitioner,

v.

V.T.; E.T.; and W.T.M,

Respondents.

(IN RE: IN THE MATTER OF A.M.A., A MINOR)

On Petition for Writ of Certiorari to
the Court of Civil Appeals of Alabama

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRYANT A. WHITMIRE, JR.
Whitmire & Coleman
Suite 501
215 R. Arrington Jr. Blvd., N.
Birmingham, AL 35203
(205) 324-6631

DOUGLAS ROGERS
Attorney at Law
3106 Independence Drive
Birmingham, AL 35209
(205) 870-9940

*ALBERT L. JORDAN
MICHAEL L. JACKSON
PHILLIP D. CORLEY, JR.
Wallace, Jordan, Ratliff
& Brandt, L.L.C.
P.O. Box 530910
Birmingham, AL 35253
(205) 870-0555

*Counsel of Record

Attorneys for Petitioner

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Ex parte W.T.M., No. 2001065,
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May 17, 2002) ("*W.T.M. III*") 2

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner submits this Reply to the Brief in Opposition submitted by Respondent W.T.M. to bring to the attention of the Court the statements made in the Supreme Court of Alabama by W.T.M.'s counsel about the federal issues involved there. In that court, W.T.M. insisted that federal law, including specifically the Adoption and Safe Families Act ("ASFA"), required the outcome.

In contrast with the position asserted by W.T.M. in this Court (i.e., that no issue of federal law is implicated by this case), in the Alabama Supreme Court W.T.M. took a different position against certiorari review of the May 17, 2002, decision of the Alabama Court of Civil Appeals. There, counsel for W.T.M. cited the ASFA in her table of authorities and further wrote:

> [The Juvenile Court's custody ruling] is insufficient as a matter of law to overcome the goal of reunification of the family expressed throughout . . . Federal mandates regarding foster care. The rationale for this [Court's] holding cites: 1)that federal mandates regulating foster care require child placement with relatives where appropriate; 2) that the purpose of ASFA is to prevent children from languishing in foster care . . . .

Initial Reply Br. and Argument of W.T.M. in *Ex parte S.P.*, Ala. Supreme Ct. No. 1012370, at 10 (filed Oct. 10, 2002) (reproduced in part in Supplemental Appendix I to this Reply Brief; quote at A4) (hereinafter "W.T.M.'s Ala. S. Ct. Br."). Further, at the Supreme Court of Alabama in

opposing certiorari review, W.T.M. criticized the trial court for not following federal law and praised the decision for which review is now sought:

> The [Juvenile Court] trial court failed to consider the rights of the father under the applicable federal mandates. . . . Thus, the Court of Civil Appeals in *Ex parte WTM*, 2002 WL 1003927 at 3,4 (Ala. Civ. App. 2002) indicated the specific federal mandates that the trial court failed to comply with upon remand and reversed the trial court again. . . . The petitioner [S.P.] urges this Honorable Court to ignore the federal statutes and federal precedent under which the State of Alabama must comply.

W.T.M.'s Ala. S. Ct. Br. at 11-12 (Supp. App. I, at A5). W.T.M. further cited the ASFA as one of the "statutory policies of protecting and preserving families" that the "Court of Civil Appeals correctly used . . . in reviewing W.T.M.'s parental rights." W.T.M.'s Ala. S. Ct. Br. at 13 (Supp. App. I, at A6). Petitioner contends that these positions of Respondent W.T.M. in the Supreme Court of Alabama conflict with the positions reflected on pages 5 and 11 of W.T.M.'s Brief in Opposition filed with this Court with respect to the presence of a question of federal law in the proceedings below.

CONCLUSION

As demonstrated, Respondent W.T.M. grossly understated here the scope of the presentation to the Supreme Court of Alabama of the existence of a question of

federal law in the proceedings below. In consideration of the conflicting positions taken by Respondent W.T.M., and for all the reasons set forth in S.P.'s Petition for Writ of Certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BRYANT A. WHITMIRE, JR.
Whitmire & Coleman
Suite 501
215 R. Arrington Jr. Blvd., N.
Birmingham, AL 35203
Voice: (205) 324-6631
Fax: (205) 324-6632

DOUGLAS ROGERS
Attorney at Law
3106 Independence Drive
Birmingham, AL 35209
Voice: (205) 870-9940
Fax: (205) 870-0042

*ALBERT L. JORDAN
MICHAEL L. JACKSON
PHILLIP D. CORLEY, JR.
Wallace, Jordan, Ratliff
& Brandt, L.L.C.
P.O. Box 530910
Birmingham, AL 35253
Voice: (205) 870-0555
Fax: (205) 871-7534

*Counsel of Record

Attorneys for Petitioner

SUPPLEMENTAL APPENDIX

APPENDIX I

[Excerpts from the Initial Reply Brief and Argument of W.T.M. in *Ex parte S.P.*, Ala. Supreme Ct. No. 1012370 (filed Oct. 10, 2002)]

S.C. NO. 1012370
THE SUPREME COURT OF ALABAMA

EX PARTE: S.P.
(In re: W.T.M. v. S.P.: Ex parte W.T.M. (In re: W.T.M. v. In the matter of A.M.A., a minor); V.T. and E.T. v. S.P.)

APPEALED FORM THE JUVENILE COURT
OF JEFFERSON COUNT, ALABAMA
(BESSEMER DIVISION)
(NOS. JU-97-700254.01)

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA
(CIVIL APPEALS NO. 2001064)
(CIVIL APPEALS NO. 2001065)
(CIVIL APPEALS NO. 2001069)

INITIAL REPLY BRIEF AND ARGUMENT OF W.T.M.

KATHRYN L. "SUNNY" LIPPERT
P.O. BOX 661111
BIRMINGHAM, AL 35266
(205) 426-3407

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STATEMENT OF THE ISSUES

I. **THIS CASE IS NOT A MATTER OF FIRST IMPRESSION.**

II. **THE OPINION OF THE COURT OF CIVIL APPEALS IS NOT IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS.**

III. **THE PETITIONER'S STATEMENT OF JURISDICTION DOES NOT INVOKE JURISDICTION AND IS INSUFFICIENT AS A MATTER OF LAW.**

STATEMENT OF THE FACTS

. . . .

SUMMARY OF ARGUMENT

W.T.M. submits that the Court of Civil Appeal followed the law, precedent and the best interest of the child in its opinion dated May 17, 2002. RC v. Nachman, 969 F. Supp. 682 (M.D. Ala. 1997) and Ala. Code 1975, § 12-15-1.1 require reunification of the family as a goal whenever possible after a child has been removed from a parent.

The child was never "removed" from W.T.M.'s custody. W.T.M. has a due process right to parent his child to the best of his ability. The trial court failed to consider his right to parent his child. As the best way to protect W.T.M.'s relationship with A.M.A. is to grant custody to his sister, V.T. and her husband, E.T., the trial court was properly reversed to assure reunification of the family absent unfitness on the part of the parties from A.M.A.'s family.

The trial court erred as a matter of law and policy. The May 17, 2002 opinion is consistent with Terry and it's progeny. Thus, this case is not a matter of first impression nor is the opinion of the Court of Civil Appeals adverse to prior decisions of the Alabama Supreme Court.

. . . .

ARGUMENT

ARGUMENT I. THIS CASE IS NOT A MATTER OF FIRST IMPRESSION. THIS CASE IS NOT A MATTER OF FIRST IMPRESSION.

The petitioner alleges that this case is a matter of first impression before this Honorable Court. To support this contention, the petitioner cites Ex parte Bryowsky, 676 So. 2d 1322 (Ala. 1996). Bryowsky is not a dependency case but a custody case arising from a modification of a divorce decree.

Ex parte W.T.M., 2002 WL 1003927, at*3 (Ala. Civ. App. 2002) holds that the trial court's finding that custody is granted to S.P. because the child had resided with her for 3 ½ years, is insufficient as a matter of law to overcome the goal of reunification of the family expressed throughout the Rules of Juvenile Procedure, policies of the State and Federal mandates regarding children in foster care. The rationale for this holding cites: 1) that federal mandates regulating foster care require child placement with relatives where appropriate; 2) that the purpose for ASFA is to prevent children from languishing in foster care; 3) that the Department of Human Resources recommended reunification of this family; 4) that the only option on remand of the initial appeal in WTM II, was for the trial court to apply the correct standard of review under Perkins. Ex parte Perkins, 646 So.2nd 46, 47 (Ala. 1994).

The issues involved in this case are controlled by Ex parte D.J., 645 So. 2d 303 (Ala. 1994). In D.J., the father sought custody of his child but the trial court continued to ignore the rights of the father, awarding custody instead to the child's grandmother. This Honorable court affirmed the Court of Civil Appeals' conclusion that in a custody contest

between a parent and non-parent, the father is entitled to the presumption that the child's best interests will be best served by a custody award to the father absent a finding of unfitness, relinquishment or prior final decree removing custody from the father.

In WTM II, 802 So. 2d 1091 (Ala. Civ. App. 2001), the Court of Civil Appeals remanded the case to the trial court for consideration of the father's rights to the child and to apply the best interest of the child standard to the award of custody. The trial court failed to consider the rights of the father under the applicable federal mandates as well as the precedent set forth in D.J. Thus, the Court of Civil Appeals in Ex parte WTM, 2002 WL 1003927 at 3, 4 (Ala. Civ. App. 2002) indicated the specific federal mandates that the trial court failed to comply with upon remand and reversed the trial court again. Among the federal mandates exists the R.C. case, which set standards for foster care and dependency cases in Alabama due to children experiencing inappropriate placements by the Department of Human Resources. RC v. Nachman, 969 F. Supp. 682 (M.D. Ala. 1997), aff'd, 145 F.3d 363 (11th Cir. 1998)

The petitioner urges this Honorable Court to ignore the federal statutes and federal precedent under which the Department of Human Resources must operate and under which the State of Alabama must comply. The petitioner fails to indicate why DJ does not control this case. The petitioner has never argued the fact set forth in Ex parte WTM, that the child has had a substantial, ongoing relationship with W.T.M. since her birth and but for his debilitating stroke, would petition alone for the custody of his child. "Given the father's limitations, awarding custody of the child to the paternal aunt and uncle is the nearest approximation to a real parent-child relationship possible for WTM and AMA." Ex parte W.T.M., *supra* at 5.

ARGUMENT II. THE OPINION OF THE COURT OF CIVIL APPEALS IS NOT IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS.

W.T.M. has remained actively involved in AMA's life as has been allowed by DHR and the trial court. W.T.M. never had an order removing A.M.A. from his custody and he was never found to be unfit. W.T.M. had a stroke, which has left him with some physical and speech impairment. W.T.M. pays child support, participated in the trial court procedure as much as he was allowed and **never** missed a visit with his child after the child was taken into custody due to dependency issues involving her mother.

Under these facts, the Court of Civil Appeals correctly used the Terry standard in reviewing W.T.M.'s parental rights along with the statutory policies of protecting and preserving families. Ex parte Terry, 494 So. 2d 628 (Ala. 1986), Adoption and Safe Families Act, §§ 12-15-1.1, 12-16-62(c) Ala. Code, 1975 (amended in part 1998). The holding in Ex parte W.T.M., finding 3 ½ years in foster care with S.P. is insufficient as a matter of law to justify the award of custody to S.P., a non-parent, is consistent with Terry.

. . . .

CONCLUSION

W.T.M. asks this Honorable to deny the petition for certiorari as the opinion of the Court of Civil Appeals followed the law, policy and best interest of the child in ruling on this matter.

Respectfully Submitted,

s/ Kathryn L. Lippert
Kathryn L. "Sunny" Lippert
Attorney for W.T.M., Father

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